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The Human Rights Act in contemporary context

HELEN FENWICK, ROGER MASTERMAN
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Introduction

A number of commentators have pointed out that the inception of Bills of Rights tends to have the effect, as in Canada, of requiring courts to grapple with justifications for rights and freedoms, taking a more philosophical approach to legal reasoning as they attempt to resolve conflicts between individual rights and competing societal and individual interests.¹ When countries adopt a document setting out a list of human rights with special constitutional status ('a Bill of Rights'), the effect on judicial reasoning tends to be dramatic – as it was in Canada when it adopted the Charter of Rights. In 2000, the Human Rights Act came into force – affording the European Convention on Human Rights further effect in domestic law – and, while it does not have the entrenched status of other Bills of Rights, there is agreement that it does have what 'constitutional' status UK law allows.²

Academics and lawyers agree that the introduction of the Act was one of the most significant developments in the public law field in the last 100 years. The Act did not create a home-grown Bill of Rights for the UK; instead, it gave further legal effect to the European Convention on Human Rights. Thus, its impact on judicial reasoning was less predictable than was the case in the broadly equivalent situation in Canada. This requires a word of explanation, since at first sight the effect on judicial reasoning in the UK was *more* predictable since the judges could

¹ See e.g. R. J. Sharpe, 'The Impact of a Bill of Rights on the Role of the Judiciary: A Canadian Perspective' and M. Darrow and P. Alston, 'Bills of Rights in Comparative Perspective', both in P. Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1999).

² *Thoburn v. Sunderland City Council* [2003] QB 151, para. 62. See also *Brown v. Stott* [2003] 1 AC 681, 703, *per* Lord Bingham.

rely on an already large and developed body of jurisprudence interpreting the Convention – that of the European Court of Human Rights (and previously the Commission) at Strasbourg. But judicial receptivity to the ECHR under the Human Rights Act was less consistent than was the case in Canada: broadly speaking, the Canadian judges gave the Charter quite a warm reception, given the widespread popular support for its adoption, whereas, among British judges, some resistance to the Convention was evident.³ The judges had become accustomed to the Convention as an international instrument, while at the same time they were proud of their long-established common law and constitutional traditions, including deference to parliament and to the executive in judicial review cases, as manifested in the *Wednesbury* doctrine.⁴ Many of them appeared to take the view that the common law was already providing an effective protection for human rights – and could continue to develop in ways that would strengthen the protection.⁵ Indeed, a number of judges continue to take this view,⁶ and it is possible to discern further developments in a common law human rights tradition, running parallel to the HRA and engaging in an uneasy and uncertain relationship with it. This resistance to the Convention can be noted in particular, albeit to varying degrees, in the chapters in the book by Gavin Phillipson,⁷ Ian Leigh, Sonia Harris-Short and Paul Roberts. There is thus a certain ambivalence in the attitude of the judiciary to the HRA,⁸ which is not paralleled in Canada where there is a patriotic

³ For example, Lord McCluskey – a long-term opponent of incorporation (see J. H. McCluskey, *Law, Justice and Democracy* (London: Sweet & Maxwell, 1987)) – wrote in *Scotland on Sunday* (6 February 2000) that the Act would be a ‘field day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers’. Buxton LJ’s article, written prior to the coming into force of the HRA, and attempting to refute the notion that it would have any impact on private law may also be seen as evidence of resistance to it, at least in that particular arena: see ‘The Human Rights Act and Private Law’ (2000) 116 LQR 48.

⁴ See *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.

⁵ See Sir John Laws, ‘Is the High Court the Guardian of Fundamental Human Rights?’ [1993] PL 57.

⁶ See e.g. the judgment of Laws LJ in *R. (ProLife Alliance) v. BBC* [2002] 2 All ER 756, which is based largely on common law reasoning. Lord Woolf’s comments in *Attorney General’s Reference (No. 1 of 2004)* [2004] 2 Cr App R 27, para. 14, that ‘Article 6 does no more than reflect the requirements of fairness which have long been a part of English law’, are also apposite.

⁷ That is, his chapter on horizontal effect, Chapter 6.

⁸ In spite of the frequent reminders that UK officials played a major part in drafting the ECHR and, for example, Jack Straw’s reminder that it is ‘[a] classical statement of what British people have taken for granted as their rights in relation to the state’ (Joint Committee on Human Rights, Minutes of Evidence, 14 March 2001, Q3).

attachment among the judiciary, the people and policy-makers to the Charter as a home-grown, specifically *Canadian* achievement. As Peter Hogg has put it:

[The Charter's] adoption in 1982 was the product of a widespread public debate, in which the inevitable risks of judicial review played a prominent role. Admittedly, the Charter was never put to and approved by a popular referendum, but it has always commanded widespread popular support. A poll taken in 1999, on the heels of two controversial Charter decisions by the Supreme Court of Canada, showed 82 per cent of those polled saying that the Charter was 'a good thing', and 61 per cent saying that the courts, not the legislatures, should have the last word when the courts decide that a law is unconstitutional.⁹

In contrast, the lack of solidly based political and popular support for the HRA is quite possibly also something which affects judicial responses to it. To say that popular backing for the HRA does not reach that evident in relation to the Canadian Charter or, for example, the Scotland Act, passed after a referendum, is to understate the matter.¹⁰ Indeed, at the time of completing this Introduction, the HRA is in the midst of a firestorm of criticism, coming not only from the Prime Minister, but also from the main Opposition party, and Britain's most popular newspaper, *The Sun*, which has launched a campaign for the repeal of the HRA,¹¹ with, it claims, 35,000 readers giving immediate support.¹² Tony Blair appears to be increasingly frustrated with the constraints upon deporting foreign prisoners and terrorist suspects imposed by Article 3.¹³ The leader of the main Opposition party, David Cameron, having pledged that the Conservatives would 'scrap,

⁹ P. Hogg, 'The Charter Revolution: Is It Undemocratic?' (2002) 12 *Constitutional Forum* 1 (footnotes omitted). For a more sceptical view, see F. L. Morton and R. Knopff, *Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

¹⁰ One commentator – a long-standing advocate of domestic human rights legislation – has welcomed the discussions which will be prompted by the Conservative's 'British Bill of Rights' initiative as the Human Rights Act has – 'in the absence of prior consultation' – 'failed to attract sufficient symbolic significance to become embedded in the national consciousness' (Francesca Klug, 'Enshrine These Rights', *Guardian*, 27 June 2006; and letter to the *Observer*, 'Parliament – A Danger to Freedom', 9 April 2006).

¹¹ See its 'Leader' of 15 May 2006: 'At last Tony Blair admits he needs to do something about the ludicrous Human Rights Act. He wants the Government to have the power to overturn judges' barmy rulings where a criminal's so-called rights come ahead of their victim's. The PM says this is one of his "most urgent policy tasks". He's not kidding . . . Rest assured, *The Sun* will continue to fight for the scrapping of this disgraceful piece of legislation.'

¹² www.thesun.co.uk/article/0..2-2006220181.00.html ¹³ See n. 18 below.

reform or replace' the Act,¹⁴ repeating the manifesto pledge they gave at the 2005 General Election, announced, as one of his first solid policy pledges since becoming leader that the Conservatives now sought to repeal the Act and replace it with a British Bill of Rights;¹⁵ the reform appears to be aimed at least in part at freeing the government from some of the more 'inconvenient' requirements of the Convention¹⁶ thought to be hampering the 'war on terror' and the fight against crime. It is clear that Mr Cameron regards this is a popular stance: it is fair to say that the attack on the HRA in the pages of certain best-selling newspapers, particularly recently, has been quite relentless, and filled with damaging myths and misconceptions.

Certainly, the HRA currently exists in a climate very different from that prevailing in 2000. We no longer feel that we are at the beginning of a new dawn for civil liberties in the UK. The emphasis of policy-makers is often no longer on the benefits of the HRA; the post-9/11 debate tends to concern methods of avoiding its effects. Thus, the current Labour government derogated from Article 5 between 2001 and 2005,¹⁷ and has actively floated the possibility of withdrawal from the ECHR, followed by re-entry, but with a reservation in relation to the *Chahal*¹⁸ principle deriving from Article 3, which the government claims is hindering its fight against international terrorism.¹⁹ Tony Blair, in an open letter to the new Home Secretary, John Reid, spoke of the need to 'look again at whether primary legislation is needed to address the issue of court rulings which overrule the Government

¹⁴ See 'Cameron Calls for Repeal of Human Rights Act', *Guardian*, 12 May 2006.

¹⁵ Announced in a speech to the Centre for Policy Studies, 26 June 2006. The full text can be found at www.conservatives.com/tile.do?def=news.story.page&obj_id=130572&speeches=1.

¹⁶ The proposed reform has been widely criticised as incoherent and contradictory, partly because the Conservatives do not propose that the UK withdraw from the ECHR itself. Michael Mansfield QC has described it as 'totally misconceived and tabloid driven'. See 'Tories Bill of Rights Bill Slammed', news.bbc.co.uk/1/hi/uk_politics/5115912.stm.

¹⁷ Human Rights Act (Designated Derogation) Order 2001, SI 2001 No. 3644: this was enacted in order to allow Parliament to pass Part IV of the Anti-Terrorism, Crime and Security Bill, allowing for detention without trial of foreign terrorist suspects.

¹⁸ *Chahal v. United Kingdom* (1996) 23 EHRR 413. That is, the principle that a signatory to the ECHR is not only prohibited from directly inflicting treatment contrary to Article 3, but may not deport a person to a country where there is a real risk of such treatment.

¹⁹ The government has considered at various points the idea of either denouncing the Convention and re-entering it while entering a reservation to Article 3, so that it can deport suspects to countries despite a risk of torture; it also suggested introducing legislation directing judges how to interpret Article 3 so that they would prioritise national security over individual rights in this context: for an analysis, see A. Lester and K. Beattie, 'Risking Torture' [2005] EHRLR 265.

in a way that is inconsistent with other EU countries' interpretation of the European Convention on Human Rights'.²⁰ The desire to free the executive from the handcuffs of human rights principles may be seen at present most vividly in the Government's attempt to have the *Chahal* principle overturned at Strasbourg,²¹ so that it will be able to deport suspected terrorists even to countries where there is a risk of their being subject to torture.²² Amongst commentators also, there is doubt not only as to the basic desirability of incorporation of the Convention,²³ but more importantly as to the approach that should be taken to its interpretation, in terms of the balance to be struck between the power of the judiciary and that of Parliament and the executive.²⁴ It is plausible to suggest that this lack of popular support may affect the attitude of the judiciary – there may be some awareness among them of the fact that, if they adopt too expansive an approach to interpreting and enforcing the HRA, it might be radically modified or even repealed. It is impossible to tell whether the current storm of criticism surrounding the Act is mere journalistic and Westminster froth, which will evaporate in a few weeks or months, leaving judicial attitudes untouched: the Prime Minister's calls for a 'profound rebalancing of the civil liberties debate'²⁵ certainly suggests that he sees this issue as a serious policy priority, rather than just short-term populist rhetoric.²⁶

²⁰ See 'Blair Stung into Review of Human Rights Law', *Telegraph*, 15 May 2006. Confidence in the Prime Minister's loyalty to the Convention and the HRA is not inspired by this seeming blunder of confusing the Council of Europe with the European Union.

²¹ For recent discussion, see the 19th Report of the Joint Committee on Human Rights, HL 185 I/HC 701-I (2005–6), at paras. 19–27.

²² The government is intervening in a case brought against Holland: *Ramzy v. Netherlands*, No. 25424/05.

²³ See e.g. C. A. Gearty and K. D. Ewing, 'Rocky Foundations for Labour's New Rights' [1997] EHRLR 146. Gearty has since modified his position to one which endorses the HRA, provided it is read in the way he suggests in n. 30 below.

²⁴ See n. 30 below.

²⁵ See 'PM Calls for "Rebalancing" of Civil Liberties Debate', *Guardian*, 15 May 2006.

²⁶ His Lord Chancellor, Lord Falconer, has been much more circumspect and, indeed, has said that the UK will not withdraw from the Convention, nor scrap the HRA; he has admitted the possibility that it could be amended 'if necessary', though his preferred course seems to be to educate judges and others as to its proper construction: see 'Human Rights Act Will Not Be Axed, Says Falconer', *Independent*, 15 May 2006. His 2006 review of the HRA, completed after the immediate firestorm of criticism around it had dissipated, amounted to a strong defence of it: *Review of the Implementation of the Human Rights Act*, Department for Constitutional Affairs, http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf.

The HRA project: problems, complexities and judicial responses

In addition to the somewhat precarious political position of the HRA, this book as a whole sets out to show that the position of the UK in relation to the ECHR under the HRA does not parallel the position in jurisdictions such as Canada, for a number of other important reasons. The application of the ECHR via the HRA is highly problematic on a number of levels. Strasbourg's jurisprudence is often notably under-theorised. The reasoning is frequently brief, and lacking in rigour. In particular, the effects of the doctrine of the margin of appreciation result in some decisions in an almost complete failure to examine in any meaningful way the proportionality of restrictions upon individual rights adopted by states.²⁷ Great variation in the intensity of review may be discerned; indeed, no single account of proportionality can be derived from the Strasbourg jurisprudence.²⁸ The purpose of the Strasbourg system is to provide a basic level of protection for human rights – a 'floor' not a 'ceiling' of rights – across a vast and disparate geographical area, one with hugely differing cultural sensitivities and governmental concerns. It is important, therefore, to be realistic about the limitations of the Strasbourg jurisprudence, lest it be thought that its 'application' in English law can cure all our current ills in human rights terms. Indeed, importation of the case-law without a keen awareness of its limitations, in particular the effect of the margin of appreciation doctrine, can actually have the effect of *legitimising* areas of law that were previously seen as increasingly untenable.²⁹ Certainly, application of the Strasbourg jurisprudence *simpliciter*, will not by itself necessarily result in a rights-driven reform of UK law.

²⁷ Notorious examples are *Müller v. Switzerland* (1991) 13 EHRR 212 and *Otto-Preminger v. Austria* (1994) 19 EHRR 34.

²⁸ For general discussion, see C. Gearty, *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2003); J. Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) CLJ 174–207. In the context of Article 10, see also G. Phillipson and H. Fenwick, *Media Freedom under the Human Rights Act* (Oxford: Oxford University Press, 2006), Chapter 2.

²⁹ An example would be the finding by Strasbourg (in *Wingrove v. UK* (1996) 24 EHRR 1) that the UK law of blasphemy does not violate the Convention, despite its openly discriminatory nature and its lack of either a public good defence or a requirement of specific intent; this gives an appearance of human rights respectability to the offence, allowing the government to claim that it is Convention-compliant, and does not therefore require reform or abolition.

It is also the case that, in addition to the difficulties inherent in the Strasbourg jurisprudence, the HRA itself is highly problematic. Intense normative and doctrinal debate continues around the balance to be struck between the enhanced power of the judiciary under the Act and that of Parliament and the executive.³⁰ The Act is also analytically and doctrinally ambiguous in some key areas – those of horizontal effect,³¹ the ambit of s.3(1)³² and the public authority definition³³ in particular. These points are explored in greater detail in subsequent chapters of this book, but, briefly, the HRA, as an incorporating instrument, gives rise to interpretative difficulties on a number of levels. First of all, there is the need to interpret the Strasbourg jurisprudence itself, to draw out the principles to be applied, by no means an easy task in many instances, given the characteristics of that jurisprudence described above. Secondly, there is sometimes a question whether to apply the case-law in domestic law at all: it is non-binding and there may be arguments in particular cases that it should not be followed.³⁴ These issues are explored in detail by Roger Masterman in Chapter 3, but, in brief, a particular problem may arise where a Strasbourg decision follows and

³⁰ Thus, Professor Gearty has argued for an approach to the HRA which maximises those aspects of it which preserve both the unfettered sovereignty of Parliament and a measure of discretion of the executive in relation to human rights issues: see his *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2003). For his most recent contribution, see *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006), Chapter 3. See also T. Campbell, 'Incorporation through Interpretation', in T. Campbell, K.D. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001); Lord Steyn, 'Deference: A Tangled Story' [2005] PL 346; J. Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' [2004] PL 592; R. Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR 859; F. Klug, 'Judicial Deference under the Human Rights Act' [2003] EHRLR 125; T. Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] PL 306; C. O'Cinneide, 'Democracy and Rights: New Directions in the Human Rights Era' (2004) 57 *Current Legal Problems* 175; D. Nicol, 'The Human Rights Act and the Politicians' (2004) 24(3) LS 451; D. Nicol, 'Are Convention Rights a No-Go Zone for Parliament?' [2002] PL 438–48.

³¹ See Chapter 6. ³² See Chapters 3 and 4.

³³ For criticisms of the judicial approach to this issue so far, see the Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act', HC 382, HL 39 (2003–4); H. Quane, 'The Strasbourg Jurisprudence and the Meaning of a "Public Authority" under the Human Rights Act' [2006] PL 106.

³⁴ Under s.2(1) HRA, it must be taken into account, but is not binding. See further R. Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" under the Human Rights Act' (2005) 54 ICLQ 907.

appears to contradict a decision of an appellate court on the same point of interpretation of Convention articles. As discussed by Gavin Phillipson in Chapter 9, precisely this problem is raised in relation to the crucial decision on privacy in *Von Hannover v. Germany*,³⁵ which immediately followed, and appears inconsistent in some respects with, the decision of the House of Lords in *Campbell v. MGN Ltd.*³⁶ A further potential clash became evident in relation to the House of Lords decision in *Qazi*,³⁷ on the scope of Article 8, which was rapidly contradicted on point by the decision of the Strasbourg court in *Connors v. United Kingdom*.³⁸ The question in subsequent litigation³⁹ was whether a lower court should follow the potentially incompatible House of Lords decision, or whether that court might be discharged from applying strict rules of precedent due to the possible conflict with more recent Strasbourg authority. The House of Lords ruled that lower courts remained bound to follow the precedents set by the Appellate Committee.⁴⁰ Thirdly, even if agreement can be reached as to the principles to be applied from the Strasbourg jurisprudence, there is still the vexed question as to the extent that the courts should defer to a 'discretionary area of judgment', enjoyed by the executive and/or Parliament, and as to its relation (if any) with the international law doctrine of the margin of appreciation, an issue discussed further by Ian Leigh in Chapter 7. If the area of law in question is common law governing private relations, the role of the Convention rights remains unclear.⁴¹ Finally, if dealing with a statute, there is the question whether its wording and overall scheme allows the courts to change its interpretation to achieve compliance, or whether instead a declaration of incompatibility should be made. This involves determining the scope of s.3(1) HRA, the crucial duty to interpret legislation compatibly with the Convention rights, if possible. As discussed in Chapters 3 and 4, the proper approach to this provision has given rise to a great deal of academic and judicial disagreement. Even where the judges agree in deciding that existing domestic law is incompatible as it stands, there

³⁵ [2004] EMLR 21. ³⁶ [2004] 2 AC 457.

³⁷ *Harrow London Borough Council v. Qazi* [2004] 1 AC 983 (HL).

³⁸ (2004) 40 EHRR 189.

³⁹ *Leeds City Council v. Price and Others* [2005] 1 WLR 1825.

⁴⁰ *Kay and Others v. Lambeth London Borough Council; Price v. Leeds City Council* [2006] UKHL 10; [2006] 2 WLR 570. On which, see the discussion in Chapter 14, pp. 437–40.

⁴¹ As discussed further in Chapter 6.

still remains the question of the extent to which it needs to change in order to become compatible.⁴²

We would therefore suggest that the HRA, through these layers of complexity, allows the judges plenty of scope to adopt either an ‘activist’ or ‘minimalist’ approach to judicial reform of domestic law:⁴³ broadly speaking, the latter would seek merely to achieve minimal compliance with the Strasbourg case-law; the former would seek to build upon it, and deploy more general Convention principles, in order to construct something much more like a Bill of Rights approach. Moreover, while the former approach would tend to emphasise deference to the role of Parliament and the executive, the latter would tend to exhibit a more muscular and expansive conception of the judicial role under the Act.

As observed above, different levels of enthusiasm are discernible towards the HRA by different members of the judiciary. It might appear possible therefore to place the senior judges in two different ‘camps’, depending on their attitude to the HRA – broadly the minimalist and activist camps. In fact, it is not possible to discern a neat polarisation between them, although some broad trends are evident. As the book indicates, certain senior members of the judiciary have been activist in one context but minimalist in another. For example, Lord Hoffmann’s strikingly activist approach in the *Belmarsh* case,⁴⁴ in which he was prepared, alone amongst a seven-strong panel, to find that there was no ‘state of emergency threatening the life of the nation’ in the UK, differed markedly from the much-criticised⁴⁵ minimalist and deferential posture he adopted in *ProLife Alliance*.⁴⁶

The above remarks are intended to indicate the main issues that this book seeks to address. It seeks to encapsulate, at this early point in the post-HRA era, after it has been in force for six years, the interaction that is occurring between the Convention rights and sometimes repressive legislation, between the rights and the common law and indeed between the rights and a more developed version of themselves – a nascent Bill of

⁴² See e.g. A. Kavanagh, ‘Statutory Interpretation and Human Rights After *Anderson*: A More Contextual Approach’ [2004] PL 537.

⁴³ Generally, contrast the viewpoints taken in Chapters 2 and 3.

⁴⁴ *A (FC) and Others (FC) v. Secretary of State for the Home Department; X (FC) and Another (FC) v. Secretary of State for the Home Department* [2004] UKHL 56.

⁴⁵ For an unusual instance of direct criticism by a fellow Law Lord, see Lord Steyn, ‘Deference: A Tangled Story’ [2005] PL 346; see also J. Jowell, ‘Judicial Deference: Servility, Civility or Institutional Capacity?’ [2004] PL 592.

⁴⁶ *ProLife Alliance v. BBC* [2004] 1 AC 185 (HL).

Rights based upon, but going further than, the Convention as interpreted at Strasbourg. If the HRA is to be utilised to create such a Bill of Rights, judges will have to look beyond the often meagre and un-theorised Convention jurisprudence in doing so.⁴⁷ The book thus focuses on both content and process since it considers changes in the substantive law and the new processes of judicial reasoning being adopted. Thus it asks: which strategies of judicial reasoning are the judges adopting under the Act? Are the judges responding to the Act in a minimalist fashion – which is arguably all that the European Convention demands? Or are they using the Act to create – in effect – a domestic Bill of Rights?

The judiciary at present shows, albeit in a patchy, inconsistent manner, some signs of taking the view that the HRA authorises the UK courts to develop their own approach to the interpretation and application of the Act in a manner that *promotes* Convention rights rather than merely respects them. The book will seek to determine whether these early signs indicate a deeper trend. If at least some of the judges see the HRA as more than simply a Convention implementation Act, how do they regard it? Are the standards of the Convention to be regarded as a domestic Bill of Rights to be given a national gloss, through a ‘constitutional’ approach to interpretation? Since there might be complications if this were the case, is the effect collateral in the sense that it will inspire the development of an indigenous, informal Bill of Rights? On the basis that the ‘Bill of Rights’ approach to the HRA has at least some support amongst certain members of the senior judiciary as the proper one, experience elsewhere suggests the need for some grounding for the whole process in which the courts are engaged – a shared understanding of the enterprise in which the judges are involved. This book sets out to make a contribution to providing that grounding. It also seeks to point up the areas in which the judiciary, through the resistance they are exhibiting to a thorough and clear-cut acceptance of the interpolation of Convention standards into areas of law which they themselves have constructed, are, in effect, preserving a wide measure of discretion as to how great a role to give to Convention standards in individual cases: the case studies examining the judicial attitude towards horizontal effect⁴⁸

⁴⁷ As one of the authors has argued elsewhere: R. Masterman, ‘Taking the Strasbourg Jurisprudence into Account: Developing a “Municipal Law of Human Rights” under the Human Rights Act’ (2005) 54 ICLQ 907.

⁴⁸ In Chapter 6.

and the *Wednesbury*/proportionality debate⁴⁹ illuminate this tendency particularly clearly.

The book, we hope, is well placed to tackle these questions because it arose out of a project which was specifically intended to bridge the gap between academics and the profession. While the papers given at the seminars and conference⁵⁰ covered specific areas of substantive law, they all set out to identify the principles and themes evident in judicial reasoning related to the HRA in a cross-cutting manner, and the contributions from the audience reflected that approach. The book therefore aims to identify the particular approach the judges are taking to reasoning under the HRA, regardless of the specific area under consideration. To this end, in Part I, it considers general Convention and HRA concepts since they arise across all areas of substantive law. It then proceeds in Part II to examine not only the use of such concepts in particular contexts, but also the modes of reasoning adopted as judges seek to straddle the divide between familiar common law and statutory concepts/doctrines and European ones. While cross-cutting themes emerge, it will also be found that there are interesting variations between substantive areas, due to particular judicial approaches that have become established in such areas, often for historical reasons.

A number of chapters in Part II of the book, including in particular Chapters 2, 7 and 13, look particularly at the extent to which the Convention rights are being afforded real efficacy in the face of a number of recent legislative measures in the areas of criminal justice and immigration/national security. In order to declare such statutes compatible with the Convention rights, it appears arguable in relation to some decisions that reliance is being placed on a minimalist interpretation of the Convention.⁵¹ Thus, this book seeks to make the argument that at the beginning of the Human Rights Act era the danger of a decrease in state accountability and the creation of merely empty or tokenistic guarantees is apparent. However, in relation to uses of coercive state power, especially in the terrorism context, the judges have, in the *Belmarsh* decision,⁵² discussed in Chapter 7, utilised the HRA to

⁴⁹ In Chapters 7 and 8. ⁵⁰ See the Preface, pp. xi–xiii.

⁵¹ See e.g. the discussion of the judgment of Laws LJ in *R (Limbuella) v. Secretary of State for the Home Department* [2004] QB 1440; [2004] 3 WLR 561 (CA), by Colin Warbrick in Chapter 2, pp. 46–51.

⁵² *A (FC) and Others (FC) v. Secretary of State for the Home Department; X (FC) and Another (FC) v. Secretary of State for the Home Department* [2004] UKHL 56. For discussion of the discrimination issues raised by this case, see Chapter 12, pp. 366–9.

scrutinise executive decisions much more intensively than they felt themselves able to do previously: in that already famous judgment, the House of Lords declared the detention without trial regime put in place by Part IV of the Anti-Terrorism, Crime and Security Act 2001 incompatible with the Convention. However, as Conor Gearty has pointed out, the Law Lords may have felt able to take this stance due to the *lack* of a strike-down power in the HRA. The responsibility for setting free possible terrorists was ultimately (and formally) passed to the government and to Parliament, since under s.4 HRA the legislation under which the men were held remained valid and of full effect, rendering their continued detention lawful, domestically: the executive was not *forced* to act. In Gearty's colourful phrase: '[The Law Lords'] liberal fingerprints would not be – could not be – the last to be found on these men should they be released; the Home Secretary's and/or Parliament's imprimatur would also have to be impressed.'⁵³ The HRA was set up (under ss.4, 6(2) and 3(2)) in order to allow the government to rely on incompatible legislation – and this is of especial importance in relation to the use of coercive state power. Nevertheless, the decision is widely seen as one of the most significant affirmations of human rights by a UK court in recent times.⁵⁴

In contrast, as Chapter 13 points out, the effect of the HRA in the criminal justice context has been muted and patchy. The book will set out to consider some of the reasons for this. It looks particularly at the extent to which the Convention is having real efficacy. This is a central concern of this book, since it argues that, in an era of heightened pressure on rights, there are dangers of a *lower* standard of protection for freedom than we had in the pre-Human Rights Act era. There is a danger that the Act will be utilised in Parliament to give the impression that a process of human rights auditing has occurred, stifling political discourse and obscuring the rights-abridging effects of legislation. Its effects may be marginalised due to the reduction or exclusion of judicial scrutiny which tends to accompany the provision of a statutory basis for interferences with rights in order to introduce further coercive state powers. This book seeks therefore, at this turning point for individual liberty in Britain, to make a contribution to the debate that is currently under way as to processes of judicial reasoning under the HRA. It argues for an understanding of the dangers of a

⁵³ C. Gearty, 'Human Rights in an Age of Terrorism: Injurious, Irrelevant or Indispensable?' (2005) 58 CLP 25, 35.

⁵⁴ See e.g. *ibid.*, p. 25.

minimalist interpretation of the Convention⁵⁵ and for the full realisation in domestic law of its underlying principles.

The structure of this book

As has been indicated, although the genesis of this book lies in a research project conducted by the Human Rights Centre at the University of Durham, it should not be assumed that each chapter reflects a uniform interpretation of what the Human Rights Act is, does or, indeed, should be. Consequently, no wholly consistent argument regarding the processes of judicial reasoning under the Act can be found in what follows; each chapter reflects the particular view of its author. Many perspectives can be discerned from the works in this collection – to an extent, that is unsurprising; as a legislative rights instrument, the Human Rights Act remains at an early stage of what will hopefully be a long life (assuming the various threats to repeal, review or otherwise neuter the potential of the HRA are not forthcoming).

This book is split into two parts. Part I, entitled ‘The Interpretation of the Human Rights Act’, examines various facets of what might be called the technical aspects of reasoning under the Act: the status of the Act and the Strasbourg jurisprudence in domestic law, the interpretative obligations of courts and tribunals, the horizontal effects of the Act, the transition from *Wednesbury* review towards a more rigorous proportionality test and the constraints on the powers of the courts under the principle of deference to the elected arms of the state. It also asks fundamental questions about the role and purpose of the Act, in particular contrasting the views of Colin Warbrick and Roger Masterman. These themes of judicial creativity and restraint, and of confidence and uncertainty which emerge, are returned to in the chapters which form Part II, entitled ‘The Human Rights Act and Substantive Law’. Each chapter in Part II seeks to examine the effects of the HRA on a specific and discrete area of the law, namely, family law, discrimination law, criminal law, the development of a common law privacy remedy, and the process of balancing competing rights in the context of reporting restrictions on judicial proceedings. While Part I might be said to approach the HRA from a constitutional perspective, as Paul Roberts notes in his chapter, it ‘does not follow from its indubitably

⁵⁵ We include within this attempts by judges to reinterpret rights in a way which provides less protection than Strasbourg, and which is unsupported by any Strasbourg authority: see n. 51 above.

constitutional status that the exclusive, or even primary, juridical significance of the Human Rights Act must be located only in the self-consciously constitutional pronouncements of the highest courts'.⁵⁶ Each of the chapters contained in Part II therefore attempts to prise out strands of reasoning as apparent in subject-specific areas of the law; they are case studies of judicial reasoning at the micro-level, in contrast to the macro-level analysis contained in Part I.

The interpretation of the Human Rights Act

The book begins with an international lawyer's perspective on the status of the Human Rights Act and of the role of domestic courts *vis-à-vis* the Convention rights. Colin Warbrick's chapter begins with an analysis of what might be termed the 'minimalist' approach to the status of the Convention in domestic law, examining whether the UK courts can be said to be discharging their obligation of giving faithful effect to the Convention case-law in a number of controversial areas. Professor Warbrick explains the nature of the Convention system and why the co-operation of all organs of the state is vital for its operation. The chapter then examines recent UK cases which have addressed the formal and substantive questions of what rights are 'Convention rights' for the HRA and what is required of states by 'Convention rights'. It concludes that these decisions show a proper regard for the demands of the principle of co-operation between UK law and the law of the ECHR. The minimum task of judicial reasoning of HRA judgments is to show that the national court has adequately and accurately taken into account the formal and substantive aspects of 'Convention rights' as understood by the European Court of Human Rights.

In the context of the status given to the Strasbourg jurisprudence in domestic law under this requirement lying upon domestic courts, Roger Masterman examines judicial approaches to this obligation, which – during the Parliamentary debates on the Human Rights Bill – was seen as going to the heart of the question of whether the Act would amount to a domestic Bill of Rights. The obligation to 'take into account' Strasbourg jurisprudence is argued to have been approached in different ways by the judiciary; a number of leading House of Lords decisions point to an obligation to follow Strasbourg jurisprudence where it is 'clear and constant', while other *dicta* points to the conclusion that this might be a more rigorous, and restricting, requirement than s.2(1) on its face appears to require. These

⁵⁶ Chapter 13, p. 378.

contrasting – although not entirely irreconcilable – interpretations of the status of Strasbourg jurisprudence post-HRA are argued to represent a conflict between the old order and the new, values of precedent and legal certainty versus ideas of constitutional adjudication and a realignment of the separation of powers.

The interpretative obligation imposed on courts and tribunals by s.3(1) of the HRA has spawned a huge range of academic analyses, befitting its status as a key provision of the Act.⁵⁷ Two of our contributors analyse s.3(1) and its requirements from different perspectives. In his chapter, David Feldman continues the idea that the judicial role – and the techniques employed by judges – should be re-examined in the light of the HRA in the specific context of the obligation to ‘interpret’ legislation compatibly with the Convention rights. Feldman explores the processes of ‘statutory interpretation’ by way of s.3(1) HRA, working from the proposition that ‘interpretation’ is not only a question of the meaning of words in their statutory context, but a question of the effects or outcomes that those words may give rise to.⁵⁸ Against this backdrop, he proposes that the constitutional and institutional competences of the various decision-makers required to make judgments under s.3(1) – whether they be judges, legislators or administrators – will necessarily shape the inquiry required of them by the HRA, and that without an appreciation of the myriad factors which might influence such decision-making we may not fully comprehend the requirements of s.3(1) itself.

Equally, the relationship between s.3(1) and the s.4 ability of the judiciary to declare legislation incompatible with ‘the Convention rights’ is also key to an understanding of the Human Rights Act as a whole. Using s.3(1) may lead to what might be argued to be the effective rewriting of a statutory provision,⁵⁹ while recourse to s.4 defers to the

⁵⁷ See e.g. C. Gearty, ‘Reconciling Parliamentary Democracy and Human Rights’ (2002) 118 LQR 248; G. Phillipson, ‘(Mis-)Reading Section 3 of the Human Rights Act’ (2003) 119 LQR 183; C. Gearty, ‘Revisiting Section 3 of the Human Rights Act’ (2003) 119 LQR 551; A. Kavanagh, ‘The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998’ (2004) 24 OJLS 259; D. Nicol, ‘Statutory Interpretation and Human Rights after *Anderson*’ [2004] PL 274; A. Kavanagh, ‘Statutory Interpretation and Human Rights after *Anderson*: A More Contextual Approach’ [2004] PL 537; A. Kavanagh, ‘Unlocking the Human Rights Act: The “Radical” Approach to Section 3(1) Revisited’ [2005] EHRLR 259.

⁵⁸ A point endorsed in Aileen Kavanagh’s discussion of *Bellinger v. Bellinger* [2003] 2 AC 467 (HL) in Chapter 5, pp. 128–9.

⁵⁹ See e.g. *R v. A (No. 2)* [2002] 1 AC 45.

enacted intention of Parliament in the legislation in question; the choice the judiciary are faced with may be seen as analogous to as a choice between ‘juristocracy’ and Parliamentary democracy.⁶⁰ In her examination of the relationship between ss.3 and 4 of the Act, Aileen Kavanagh emphasises – in line with David Feldman – that we should not simply conceive of s.3(1) in terms of finding an interpretation which is linguistically possible. Basing her reasoning on the decision of the House of Lords in *Ghaidan v. Godin-Mendoza*, Kavanagh suggests that ‘the choice between sections 3 and 4 involves a much broader evaluative decision requiring an assessment of the limits of judicial law-making in the context of a particular case’.⁶¹ But does this amount to a sea-change in the process of judicial reasoning? Kavanagh argues that it does not. Comparing *Ghaidan* with the pre-HRA decision of *Fitzpatrick v. Sterling Housing Association Ltd*,⁶² this chapter concludes by finding that it is not the methods of judicial reasoning that have changed, but the judiciary’s willingness – in the appropriate case – to utilise those methods in a more creative manner. Dr Kavanagh also stresses the broad, contextual approach that the courts have taken to s.3(1), in which a wide range of factors is considered in deciding whether to reinterpret a statutory provision using that section. While this is an approach with which she personally agrees,⁶³ it may be noted that it is also one which maximises judicial discretion in relation to the use of s.3(1), a theme which reoccurs in a number of other chapters in this book.

Prior to the implementation of the HRA, the potential horizontal effect of the Act was a matter of some controversy. Some saw the Act as the catalyst for the creative development of common law doctrines to ensure that full effect was given to Convention rights⁶⁴ in the face of significant loci of private power; others saw it as a mechanism which would allow private citizens to assert Convention rights independently of a pre-existing cause of action,⁶⁵ others still as a distortion of the Convention’s role as between the individual and the state.⁶⁶ In chapter 6,

⁶⁰ K. D. Ewing, ‘The Bill of Rights Debate: Democracy or Juristocracy in Britain?’, in K. D. Ewing, C. A. Gearty and B. Hepple, *Human Rights and Labour Law* (London: Mansell, 1994).

⁶¹ See Chapter 5, p. 141. ⁶² [2001] 1 AC 27.

⁶³ See her ‘Statutory Interpretation and Human Rights after *Anderson*: A More Contextual Approach’ [2004] PL 537.

⁶⁴ M. Hunt, ‘The “Horizontal Effect” of the Human Rights Act’ [1998] PL 423.

⁶⁵ H. W. R. Wade, ‘Horizons of Horizontality’ (2000) 116 LQR 217.

⁶⁶ R. Buxton, ‘The Human Rights Act and Private Law’ (2000) 116 LQR 48.

Gavin Phillipson argues that this area of reasoning is marked by a judicial failure to engage effectively with the theoretical and practical justifications for this use of the Convention rights and their accompanying jurisprudence. Moreover, the judiciary has shown a marked and increasing preference to avoid resolving this issue at any general level, thus preserving effective judicial discretion in this area. Thus, one important question remains unanswered: as Phillipson argues; ‘the courts have left themselves the *ability* to bring Convention principles into private law, but have not fully accepted a position in which they are bound to act compatibly with them’.⁶⁷

In his chapter, ‘The Standard of Review and Legal Reasoning after the Human Rights Act’, Ian Leigh investigates emerging trends in judicial review decisions under the HRA. Two broad themes can be identified: expansionary tendencies which seek to engage with the Strasbourg jurisprudence to intensify the standard of review, and those which seek to limit or resist that expansion. In common with the preceding chapter, the under-theorised approach to the potential impact of the HRA is addressed in the context of the judicial review of administrative action through the effective reversion to the standards of *Wednesbury* review, the tendency to give variable weight to different rights, and the concept of ‘indirect deference’ to Parliament. By contrast, Sir David Keene provides a judicial perspective on the concept of deference as applied under the Human Rights Act, endorsing the principles enunciated by Laws LJ in the case of *International Transport Roth GmbH v. Secretary of State for the Home Department*.⁶⁸ This chapter emphatically endorses the notion that, in spite of the enthusiastic embrace of theoretical analysis of the Human Rights Act by the academic branch (particularly in its discussion of the concept of deference),⁶⁹ for the judiciary at least, charged with the task of applying principle in practice, there remains a vital sense of pragmatism. As Sir David notes in his

⁶⁷ Chapter 6, p. 172. ⁶⁸ [2002] 3 WLR 344, 376–8.

⁶⁹ See e.g. J. Jowell, ‘Judicial Deference: Servility, Civility or Institutional Capacity?’ [2003] PL 592; M. Hunt, ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’, in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford: Hart, 2003); F. Klug, ‘Judicial Deference under the Human Rights Act’ [2003] EHRLR 125; R. Clayton, ‘Judicial Deference and “Democratic Dialogue”: The Legitimacy of Judicial Intervention under the Human Rights Act 1998’ [2004] PL 33; K. D. Ewing, ‘The Futility of the Human Rights Act’ [2004] PL 829; A. Young, ‘*Ghaidan v. Godin-Mendoza*: Avoiding the Deference Trap’ [2005] PL 23.

chapter, citing Lord Steyn's speech in *ex parte Daly*, 'in law context is everything'.⁷⁰

The Human Rights Act and substantive law

The potential for domestic courts under the Human Rights Act to develop a remedy for invasions of personal privacy was one of the more controversial predicted effects of judicial reasoning under the Act.⁷¹ Indeed, in the first substantive, 'privacy' case heard after the coming into effect of the Human Rights Act, one member of the Court of Appeal felt confident enough to assert that 'we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy'.⁷² The obvious contrast of this stance with the conservative approach adopted by the Court of Appeal in *Kaye v. Robertson*⁷³ appears to demonstrate an enthusiastic embrace of the Convention standards in an area in which domestic law was widely argued to be lacking. And, despite subsequent courts' less than convincing endorsements of Sedley LJ's *dicta*,⁷⁴ Gavin Phillipson argues that the effect of the HRA on the common law doctrine of breach of confidence in the *Campbell*⁷⁵ decision has been such that it can now be asserted that we have – in all but name – a tort of invasion of privacy. However, he goes on to suggest that this radical use of the Convention is in fact paradoxical: the House of Lords made vigorous use of it to develop breach of confidence into a new tort of misuse of private information, before there was even a clear Strasbourg precedent requiring such action. *Von Hannover v. Germany*⁷⁶ subsequently provided that precedent, but also appeared to expand the requirements of Article 8 beyond those catered for by *Campbell*. In response, Phillipson argues, the courts in subsequent cases have so far resolutely avoided recognition of this area of dissonance, let alone sought to address it – an example perhaps of both the ambivalence surrounding the importation of Strasbourg jurisprudence into the private

⁷⁰ *R. v. Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532, para. 28.

⁷¹ See e.g. Lord Irvine of Lairg's comments at HL Debs., 24 November 1997, cols. 784–6.

⁷² *Douglas v. Hello!* [2001] QB 967, 997, *per* Sedley LJ. ⁷³ [1991] FSR 62.

⁷⁴ See e.g. the comments of Lord Hoffmann in *Wainwright v. Home Office* [2003] 3 WLR 1137, para. 30: 'I do not understand Sedley LJ to have been advocating the creation of a high-level principle of invasion of privacy. His observations are in my opinion no more (although certainly no less) than a plea for the extension and possibly renaming of the old action for breach of confidence.'

⁷⁵ [2004] 2 WLR 1232. ⁷⁶ [2004] EMLR 21.

common law, and the reluctance to revisit the decisions of superior courts in the light of subsequent Strasbourg judgments.

In the succeeding chapter, Helen Fenwick continues this assessment of the courts' ability to effectively resolve issues of competing rights. As Sir David Keene indicates in his foreword to this work, the courts are accustomed to the task of 'striking the balance between the public interest and individual rights'; the Human Rights Act changes the nature of this judicial inquiry in those cases where competing Convention rights are raised. Fenwick examines the emerging jurisprudence on conflicts of media free speech and the privacy of children, arguing that the results demonstrate the 'contradictory nature' of much judicial decision-making under the Act which can be seen to 'reveal ... a sophisticated understanding of the value of individual rights under the Convention' while simultaneously reflecting 'the determination of judges to resist the HRA where a particular strand of consequentialist thinking has become entrenched in a field of law'.⁷⁷

Sonia Harris-Short analyses the impact of the Human Rights Act in the sphere of family law. In the context of the regulation of intimate adult relationships and public and private law disputes concerning children, this chapter explores the initial, stunted, impact of the HRA in this area of the law. Of all those examined in this part of the book, adjudication in the family law field has been marked by a judicial reluctance to engage with the Convention rights, and with rights-based reasoning more generally. Two major reasons are advanced for the minimal impact of the HRA in this field; first, a judicial and practitioner attachment to the domestic tradition which places the welfare principle and the concept of the family unit at its core, a framework which is felt to be threatened by the potential adoption of more 'individualistic' human rights standards.⁷⁸ Secondly, this initial reluctance to engage with Convention standards is compounded by the fact that family law cases frequently engage sensitive issues of public policy and resource allocation, issues which under the separation of powers are – rightly or wrongly – traditionally regarded as the domain of

⁷⁷ See Chapter 10, p. 304. This latter point is also drawn out by the analyses of Sonia Harris-Short and Paul Roberts in their respective chapters.

⁷⁸ Similar themes arise in Paul Robert's chapter, which also notes the judicial attachment to existing domestic standards as a potential reason for domestic courts failing to engage properly with Strasbourg.

Parliament, and not of the courts.⁷⁹ The tensions described in Part I over the correct constitutional position and role of the courts in the emerging judicial human rights discourse are again therefore apparent at the micro-level, as the decision of the House of Lords in *Bellinger v. Bellinger*⁸⁰ amply illustrates. But, again, the dangers of attempting to extract any themes common to specific areas of law are apparent in this analysis as, by way of contrast with the decision in *Bellinger*, the House of Lords decision in *Mendoza* – again a case involving sensitive policy concerns – nevertheless provoked a ‘strong bout of judicial activism’.⁸¹ This largely cautious approach to the HRA and the Convention rights is echoed in the case-law arising out of disputes involving children – especially those governed by private law – where it is argued that, ‘whilst the poor quality of reasoning employed in these cases is disappointing, the concern of the judiciary at turning their back on the welfare approach is understandable, if essentially misplaced’.⁸²

The changing nature of the judicial role is analysed further in Aaron Baker’s chapter, ‘Article 14 ECHR: A Protector, Not a Prosecutor’. In common with chapters before and after, Baker highlights the tensions in judicial decisions as the courts come to terms with a new anti-discrimination provision. Particular attention is given to the – incorrect – assumption that Article 14 is ‘parasitic’ and structural problems caused by this for the processes of reasoning in domestic discrimination cases. Further, Baker charts the courts’ attempts to move towards the more victim-centred analysis required by Article 14 – an analysis which is again at odds with domestic law traditions in this field which require a focus to be placed on the reasons for a certain decision, rather than its effects.⁸³

In Chapter 13, Paul Roberts analyses the presumption of innocence as a human right – an issue which has been the subject of considerable litigation in the appellate courts over recent years, and on which there appears to be very little in terms of judicial consensus. For that reason alone, Roberts argues, the concept of the presumption of innocence would be an apt case study on judicial reasoning in the post-HRA era; the issue is given further salience by the fact that, prior to the HRA, many of the points raised by appeals were considered well-settled issues of criminal procedure. Again therefore, the HRA can be seen as the

⁷⁹ See e.g. the discussion of *Bellinger v. Bellinger*, in Chapter 4, p. 122.

⁸⁰ [2003] 2 AC 467. ⁸¹ Chapter 11, p. 317. ⁸² *Ibid.*, p. 346.

⁸³ A tension paralleled in the movements towards a more intensive standard of judicial review, discussed by Ian Leigh in Chapter 7, pp. 179–91.

catalyst for a questioning of existing domestic standards previously – and amongst some judges arguably still⁸⁴ – thought to provide satisfactory protection for ‘rights’. So, Roberts argues, the interface of domestic and European standards has brought about a ‘liberating effect’ on judicial interpretation – one which extends beyond the apparent scope of Article 6 ECHR – but argues that judicial reasoning in this sphere has been blighted by conceptual uncertainty and a tendency towards ‘results-oriented reasoning’ which threatens to hamper the coherent judicial articulation of the presumption of innocence.

From the above, it will be seen that this book ranges widely over both procedural and substantive aspects of the HRA and its impact. We hope it will stimulate further thought and debate on this centrally important topic.

⁸⁴ See n. 6 above.